FILED
AUG 23 19

Supreme Court of the United States

OCTOBER TERM, 1951

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1111,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

David Rosenberg,
Isaac A. Perlmutter,
11 East 51st Street,
New York 22, New York,

Attorneys for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	4
A. The Facts	4
The Events Prior to February 29, 1952	4
The Events of February 28, 1952, the Work Stoppage, the Locking of the Gates and the Termination of the Work Stoppage	5
The Employer's Refusal to Bargain on February 28 and February 29, 1952. The Discharge of All Employees on February 29, 1952	6
The Termination of the Contract, the Failure to Recall the Laid-off Employees, and the Continuing Refusal to Bargain	7
The Non-Participants in the February 28th Stoppage	7
B. The Decisions Below	9
Reasons for Granting the Writ	11
The 8(d) Questions	12
The February 29th Discharge of the Non-Participants	17
The Employer Refusals to Bargain	23
The Discriminatory Nature of the Discharges of the Participants in the Stoppage and the Failure to Recall the Laid-off Workers	28

PAGE

CONCLUSION 31

APPENDIX A—Statutory Provisions Involved 33

APPENDIX B:

Opinion 36

Decree 47

TABLE OF CASES CITED

Berkshire Knitting Mills v. NLRB (CA 3), 139 F. 2d 134, cert. den. 322 U. S. 747 22

BVD Co., 110 NLRB #106, 35 LRRM 1246 18

Coronado Coal v. U.M.W.A., 259 U. S. 344 17

Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275 17

Lawlor v. Loewe, 235 U. S. 522 ..... 17, 18

Local No. 3 UPWA v. NLRB, 210 F. 2d 325, cert. den. 348 U. S. 322 14

Lion Oil Co., 109 NLRB 680 ..... 13, 14, 16

Lion Oil Co. v. NLRB, 221 F. 2d 231 14

Marathon Electric Mfg. Corp., 106 NLRB, at p. 1175 22

Marathon Electric Mfg. Corp. v. Industrial Commission and Leslie Dickinson, 269 Wis. 394, 69 NW 2d 573, rehearing den. ..... Wis. ....., 70 NW 2d 576 20

Mastro Plastics Corp. (CA 2), 218 F. 2d 462, cert. granted 348 U. S. 910 22

Mastro Plastics v. NLRB, October Term, 1955, No. 19, cert. granted 348 U. S. 910 13

Mastro Plastics Corp., 103 NLRB 511 14

NLRB v. Braswell Freight Lines, 209 F. 2d 622 21

PAGE

NLRB v. Brown & Root, Inc. (CA 8), 203 F. 2d 139 22

NLRB v. Burton-Dixie Corp. (CA 10), 210 F. 2d 199 26

NLRB v. Columbian Enamelling and Stamping Co., 306 U. S. 292, 297 26

NLRB v. Dorsey Trailers, Inc. (CA 5), 179 F. 2d 589 ..... 23, 25

NLRB v. E. A. Laboratories, Inc. (CA 2), 188 F. 2d 885, cert. den. 342 U. S. 671 22

NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240, 256-257 28

NLRB v. Highland Shoe, Inc. (CA 1), 119 F. 2d 218 25-26

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45 28

NLRB v. Kobritz (CA 1), 193 F. 2d 8 22

NLRB v. Lion Oil Co., No. ....., Oct. Term, 1955, p. 6 13

NLRB v. Marshall Car Wheel & Foundry Corp. (CA 5), 218 F. 2d 409 20

NLRB v. Mastro Plastics Corp., 214 F. 2d 462 14

NLRB v. M. H. Ritzwoller Co. (CA 7), 114 F. 2d 436 26

NLRB v. Ohio Calcium Co. (CA 6), 133 F. 2d 721, 726 21

NLRB v. Remington Rand (CA 2), 94 F. 2d 862, 872 29

NLRB v. Sands Mfg. Co., 306 U. S. 332 30

NLRB v. Stilley Plywood, Inc., 199 F. 2d 319, cert. den. 344 U. S. 933 22

Phelps Dodge Corporation v. NLRB, 313 U. S. 177 30

Remington-Rand, Inc., 2 NLRB 826 19

Schneiderman v. United States, 320 U. S. 118 17

PAGE

Stewart Die Casting Corp. v. NLRB (CA 7), 114 F. 2d 849, cert. den. 312 U. S. 680 ..... 21, 22

Timken Roller Bearing Co. v. NLRB (CA 6), 161 F. 2d 949 ..... 23, 25

U.M.W.A. v. Coronado Coal Co., 268 U. S. 295 17

Universal Camera Corp. v. NLRB, 340 U. S. 474 27

United Packinghouse Workers of America, 89 NLRB 310 ..... 13, 14, 16

United States v. White, 332 U. S. 694, 702 17

Valley City Furniture Co., 110 NLRB No. 216, 35 LRRM 1265 24

West Coast Casket Co., Inc. (CA 9), 205 F. 2d 902 22

STATUTES CITED

28 U.S.C. Sec. 1254 2

29 U.S.C. 151, et seq. 4

61 Stat. 136 et seq. 4

National Labor Relations Act:

Section 7 ..... 4, 19, 24

Section 8(a)(1) 2, 4, 9

Section 8(a)(2) 9, 29

Section 8(a)(3) 2, 4, 9, 30

Section 8(a)(5) 2, 3, 4, 9

Section 8(d) 2, 3, 4, 7, 10, 12, 13, 15, 16, 17, 30, 31

Section 8(d)(3) 2, 7, 15

Section 10(f) 2

AUTHORITIES AND MISCELLANEOUS CITED

PAGE

Bureau of National Affairs, Collective Bargaining and Contract Negotiations Manual, 12:325 11

House Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. (1947), pp. 41-42, 1 Legislative History, LMRA, 545-546 16

House Conf. Rep. No. 510, p. 35, 1 Legislative History, 539 16

Memorial of the Special Committee appointed by the Association of the Bar of the City of New York, New York Legislative Documents, Vol. 5, 143rd Sess. (1920) No. 30, p. 4 20

93 Cong. Rec. 6860, 2 Legislative History, 1625 16

Sen. Rep. No. 6, Part 1, 76th Cong., 1st Sess., pp. 97-110, 136, 137 19

S. 55, Sec. 3(2) 80th Cong., 1st Sess. 16

S. 404, Sec. 3(a)(1) 80th Cong., 1st Sess. 16

Wirtz, The New National Labor Relations Board; Herein of Employer Persuasion, 49 Northwestern U. L. Rev. 594 (1954) 12

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

United Electrical, Radio and Machine Workers of America, (UE) Local 1113, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on May 26, 1955.

Opinions Below

The opinion of the Court below (App. B, infra, pp. 36 to 46) is not yet reported. The Decision and Order of the National Labor Relations Board and the Intermediate Report and Recommended Order are reported at 106 NLRB 1171, and incorporated at pages 123-208 of the Joint Appendix printed for use of the Court below and filed here.[1]

[1] Page references to the Joint Appendix printed below and filed here are preceded by the letters "J.A." Page references to the unprinted record are preceded by the symbol "Tr." The General Counsel's exhibits at the hearing are designated "G.C."

Jurisdiction

The judgment of the Court below was entered on May 26, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 and Section 10(f) of the National Labor Relations Act as amended.

Questions Presented

1. Whether under the "cooling off" provisions of Section 8(d) of the National Labor Relations Act a party to a collective bargaining agreement may terminate its contract after the other party's breach and discontinue terms and conditions of the existing contract without giving the notices required by Section 8(d) when the other party to the contract has previously sought to obtain mutual agreement to the incorporation of new provisions in the contract during its term without giving the notices required by Section 8(d)(3).

2. Whether under the National Labor Relations Act and the Due Process clause of the Fifth Amendment, a union member who is not shown to have authorized or actually participated in a work stoppage in breach of contract found to have been caused by his union leadership may nonetheless be held to be a participant in that stoppage solely because of his union membership, unless he affirmatively disprove his authorization of, participation in, or ratification of the stoppage.

3. Whether under Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act an employer may require its employees affirmatively to accept the employer's conditions of employment which are illegal under Sections 8(a)(1) and 8(a)(5) of the Act in order to retain their jobs.

4. Whether under Section 8(a)(5) of the Act, an employer may refuse to meet with and bargain collectively with the union representing its employees until it receives notice of the termination of a stoppage found to have been caused by the union in breach of contract.

5. The Court below held that the Union, by asking for a meeting on the Employer's lockout of its employees, had not given adequate notice to the Employer of the termination of a stoppage it found to be in breach of contract, and that the Employer was not obligated to bargain with the Union on that day. On the morning of the following day a substantial majority of the employees represented by the Union appeared at the plant gates ready for work, but were rejected. The Employer still failed to bargain with the Union. The following question is presented:

Whether under Section 8(a)(5) of the Act, an employer may refuse to meet and bargain with a union then qualified as the collective bargaining representative of its employees because the request for collective bargaining made the day before when the union was found not to have been entitled to act as collective bargaining representative under the Act was not reiterated when the union became qualified.

6. Whether the evidence supports the finding that the Employer was not put on notice on February 28, 1952 of the termination of the stoppage.

7. (a) Whether the evidence supports the finding that the Employer discharged the participants in the stoppage here and refused to recall the laid-off employees because of their union membership.

(b) Whether an employer may discharge its employees because of their union membership when they have engaged in a work stoppage found to be in violation of Section 8(d) of the Act.

Statutes Involved

The statutory provisions involved, Sections 7, 8(a)(1), 8(a)(3), 8(a)(5) and 8(d) of the National Labor Relations Act as amended, 61 Stat. 136, *et seq.*, 29 U. S. C. 151, *et seq.*, appear in Appendix A, *infra*, at pp. 33 to 35.

Statement of the Case

A. The Facts

The Events Prior to February 29, 1952.

On July 31, 1951, the Marathon Electric Manufacturing Company (herein called the Employer) entered into a one year collective bargaining agreement with an unincorporated labor association, United Electrical, Radio and Machine Workers of America, Local 1113 (herein called the UE), the recognized representative of its employees at its Wausau, Wis. plant. This contract contained, among other provisions, a union recognition clause (Art. I, J.A. 116), a union shop clause requiring all employees to become and remain members of the UE (Art. II, J.A. 116), a seniority clause providing that laid off workers should retain preference for purposes of hiring for a period of two years (Art. V, J.A. 120), and a no-strike, no-lockout clause permitting the discharge of workers (subject to subsequent arbitration) who deliberately took part in a violation of that clause (Art. XII, J.A. 122).

The contract further provided for a 9¢ an hour wage increase, subject to any necessary approval of the Wage Stabilization Board (Art. X, J.A. 121). Subsequently, it was discovered that under existing WSB regulations and policies only 7¢ of the wage increase could be put into effect. The UE then entered into negotiations with the Employer seeking to have the remaining 2¢ an hour put into effect in the form of "fringe benefits" acceptable to the WSB under

its regulations and policies (J.A. 99-103). The Employer voluntarily entered into discussions of various such proposals, but finally on February 27, 1952, took the position that it would not put the 2¢ increase into effect in any way (J.A. 96).

On February 22, 1952, at a membership meeting of the UE, the taking of a strike vote was authorized by a secret ballot. Five or six members voted against the strike vote proposal (Tr. 1194). The record does not disclose the number of people attending the meeting or (in the main) their identity.

The Events of February 28, 1952, The Work Stoppage, The Locking of the The Gates, and The Termination of The Work Stoppage.

On the morning of February 28, 1952, the day following the Employer's rejection of all proposals for putting the 2¢ increase into effect, the Union officers and stewards met and voted to call a full membership meeting at 2:00 o'clock that afternoon (Tr. 31-32). On that date, the Employer employed approximately 480 workers on the first shift, 60 on the second shift, and 10 on the third shift. In addition, a large group of workers were on layoff status entitled to seniority preference in hiring. At 2:00 P. M., one hour before their regular quitting time, 445 first shift employees of the Employer who were in the plant left the plant to attend the Union meeting.

At about 2:30 P. M., the Employer locked the plant gates, the traditional signal that the plant was not operating (Tr. 139-141). News of this action reached the Union meeting about 3:00 P. M. After this announcement and some further discussion, the Chairman directed the employees to report for work at their regular times and continue to report until told otherwise, an instruction which was followed until March 4 (Tr. 38, 79-80).

The Employer's Refusal to Bargain on February 28 and February 29, 1952. The Discharge of All Employees on February 29, 1952.

On February 28, 1952, the Employer's President resolved that he would never deal or bargain with the UE again (J.A. 108).

In the late afternoon of February 28, 1952, subsequent to the ending of the work stoppage, the UE bargaining committee contacted the Employer's Factory Manager by telephone and asked him to arrange a conference for the return of the employees. Its call was never returned (J.A. 16).

On the morning of February 29, 1952, after the employees appeared for work at the plant gate the Employer neither opened the gates so that they might return to work nor returned the UE's call of the evening before. Instead it published the following statement as an advertisement in the local paper and mailed a copy to each of its 550 employees on the active payroll:

> "At 2 P. M. on February 28, 1952, the Factory employees of Marathon Electric Manufacturing Corporation voluntarily left their jobs in violation of an agreement which was in existence between the Union and the Company. This agreement provided that 'THE UNION WOULD NOT AUTHORIZE OR SANCTION ANY STRIKE, STOPPAGE, SLOW-DOWN OR RESTRICTIONS OF OUTPUT AND IN ANY CASE ANY SUCH ACTION SHOULD OCCUR, ANY OR ALL OF THE EMPLOYEES TAKING PART WOULD BE SUBJECT TO DISCHARGE.' Since the action taken by the Union and its members Thursday afternoon was the second such violation resulting from irresponsible leadership, the Company has no alternative but to consider that all participants have forfeited any rights as employees and are accordingly being removed from the Company payroll. This means that all employee benefits such as group insurance, vacation plans, holiday pay plans, etc., are being eliminated immediately.
>
> "Since the present Union leadership has seen fit for the second time to dishonor written agreements, the Company feels it useless to deal with any such repre-

sentatives of the employees. The Company will only deal with responsible representative groups of employees in the future."

The Termination of the Contract. The Failure to Recall the Laid-off Employees, and the Continuing Refusal to Bargain.

On March 5, 1952, the Employer wrote to the Union terminating the contract and informing it that since all employees who took part in the work stoppage were discharged, UE no longer represented a majority of the employees and the Employer would no longer recognize it as the bargaining agent (J.A. 169-170). A similar letter was sent to all employees on the active payroll (with the exception of union officials) asking them to apply for work as new employees (J.A. 168-169). The Employer did not send the sixty-day notice to the Union and the thirty-day notices to the Conciliation services required by Section 8(d) of the Act. Prior to February 28th the Union did not send the notices to the Conciliation services required by 8(d)(3) of the Act.

On March 3rd, the Employer advertised for new employees (J.A. 168) and on the following day, the Union commenced formal picketing which continued for at least several months. At no time did the Employer recall any of the laid-off employees under the contract procedures.

On March 27th, the Union wrote the Employer asking negotiations to iron out their differences. No reply was made to this letter, and similar overtures from the Union were either unanswered or rejected, including an offer on April 15, 1952, to submit the discharges to arbitration under the contract (Tr. 55-60).

The Non-Participants in the February 28th Stoppage.

Of the some 550 employees, approximately 100 did not leave their work to attend the Union meeting. None of these (except for four UE stewards) are shown to have

participated in the stoppage of February 28th, or taken part in either the meeting of February 22nd which authorized the taking of a strike vote, or the meeting of officers and stewards on February 28th which voted to call the full membership meeting later that day.[1a]

The record shows affirmatively that 23 of the workers listed above did not attend the union meeting.[2] Twelve employees—mainly second-shift workers who had found the gates locked—did.[3] There is no evidence in the record that any of the remaining 45 employees who were not in the plant at 2 P. M. on February 28th attended the meeting—or knew of it.

[1a] The record with regard to this group stands as follows:

1) Thirteen employees were absent because of illness and injuries incapacitating them for periods ranging until April 1, 1952 (Tr. 176-178, 441-444, 521-525, 803-805, 816-824, 843-852, 944-947; G.C. Exh. 4, Tr. 44).

2) Twenty-five first-shift employees were either absent all of February 28th or excused from work prior to 2 P. M. on that day (Tr. 136-166, 375-394, 356-368, 453-474; G.C. Exh. 4, Tr. 44).

3) Fourteen workers were not scheduled to report for work until after the locking of the gates became generally known in the community (Tr. 780; G.C. Exh. 4, Tr. 44).

4) Thirteen second-shift workers are affirmatively shown to have reported for work prior to 3 P. M. on February 28th and to have found the gates locked. Three second-shift workers are shown to have been in the vicinity of the plant shortly before 3 P. M. (Tr. 166-171, 444-450, 474-477, 506-517, 526-539 556-564, 622-641, 736-747, 795-802, 805-814, 857-874, 1385; Tr. 476).

5) There is no evidence whatsoever concerning the activities of 32 second-shift workers.

6) Three second-shift workers are shown to have attended the meeting rather than reporting for work (Tr. 781, 1236).

[2] Tr. 138, 147, 160, 187, 204, 357, 376, 394, 441-442, 512, 524, 528, 558, 582, 611, 804, 817, 845, 846, 860, 945, 973.

[3] Tr. 448, 441, 627, 746, 779, 808, 870, 989, 1181, 1236.

B. The Decisions Below

On the basis of these facts, the Trial Examiner found as follows:

1) The discharge of the non-participants on February 29th, and the failure to recall the laid-off employees was discriminatory and violated Section 8(a)(1) and 8(a)(3) of the Act. He excluded from this group, however, the 32 second-shift employees concerning whom no evidence was introduced (J.A. 148-155).

2) The Employer had refused to bargain with the Union on and after February 28th, in violation of Sec. 8(a)(1) and 8(a)(5) of the Act (J.A. 158-160).

3) The Employer had committed other violations of Sec. 8(a)(1) and 8(a)(2) of the Act after March 5th (J.A. 160-162).

The Court below, upon petition by the charging party from the Board's decision, upheld the reversal of these findings by the National Labor Relations Board on the following grounds:

1) The evidence supported the finding by the Board that all the employees were participants in the stoppage because they had all "acquiesced in, ratified and become parties to their agent's action" by taking no steps after the UE's action had ceased and after their discharge to indicate they were not participants. This evidence upon which the Court below relied is summarized by the Board as follows (J.A. 193-195):

> a) The non-participants were members of a "strong and militant" local of UE. The record is silent as to any showing of dissent on their part prior to the walkout which was joined in by all the employees in the plant at the time.

b) None of the non-participants made any attempt to dissociate himself from the walkout after the Employer's letter of February 29th discharging them.

c) "Many" of the second-shift workers upon finding the plant gates locked went to the Union meeting.

d) The testimony of 11 of 31 non-participants at the hearing (which the Board described as a "sampling") was in effect that they would not have accepted any offer of reinstatement which did not include all the employees.

e) "Many" of those reporting for work on their regular shifts after the meeting did so as part of a "tactical manoeuvre."

2) The termination of the contract and cancellation of its provisions on February 29th and March 5th was not a violation of 8(d) of the Act which forbids such action absent sixty days notice, since UE itself had sought in negotiations to modify the existing contract without giving the thirty day notice to the conciliation services required by 8(d)(3).

3) The Employer did not refuse to bargain apart from the provisions of 8(d) by refusing to bargain with the UE. On February 28th the Employer had no notice of the termination of the walkout, and the UE was not entitled to the "privileges" of the Act (App. B, p. 45), and on March 27th when the next bargaining overture was made by the UE, UE no longer represented a majority of a substantial complement of the plant employees.

4) The evidence supported the Board finding that the Employer's failure to recall the laid-off workers and the discharge of the participants in the stoppage was not discriminatory in motive. In any event, the employee's violation of 8(d) freed the employer to discriminate against them because of their union membership.

Reasons for Granting the Writ

1. This petition brings before this Court important issues under the Act and going beyond its scope, involving the proper conduct and the rights, duties and status of employers, unions and employees in the period surrounding the breach of the no-strike clause of a collective bargaining agreement. Over 89% of all Union contracts contain no strike, no lockout agreements.[4] Although exact statistics are unavailable, it is a matter of industrial history that strikes and lockouts during the term of such contracts do occur. The issues here raised thus can affect almost every industrial worker in the country in his relations with his union and with his employer (either directly or through his union).

The impact of the decision below on the employer-employee-union relationship is particularly severe by reason of the drastic changes in basic rights and duties consequent to the breach of no strike, no lockout clause which it sanctions. For the employee the decision below raises vital questions of proper personal conduct in a period where a misstep may cost him his rights under the Act, bring about his discharge, and condemn him to the economic scrap heap. For unions and employers it raises the question of how—if at all—they may seek to adjust or refuse to adjust their contracts to changes in circumstances during the contract term and the remedies of which they may avail themselves. For all parties it raises the question of the meaning and extent of the duty to bargain during the period around a stoppage in breach of contract, the facts which give rise to this duty and how—if at all—an employee may lose his personal right to bargain collectively through representatives of his own choosing while retaining his employee status.

---

[4] Bureau of National Affairs, *Collective Bargaining and Contract Negotiations Manual*, 12:325.

The decision below, resting in the main upon the Board opinion, now stands as an authoritative judicial sanction for the approach of the "new Board" in the interpretation of the Act. As Professor Willard Wirtz has recently pointed out in discussing the decisions of this Board in another area,

> "• • • what has in fact happened is that even as the 83rd Congress has been proving itself again unable to agree on even minor amendments to the Act, the new NLRB—manned suddenly by a majority made up of three new appointees—has proceeded to 'reinterpret' the Act in such a manner as to change its practical application substantially beyond anything seriously considered in recent Congresses." [5]

The decision below is important not only because of the sanction it grants to the new legal principles established by the Board, but because of its sanction of the new Board's approach to the evaluation of evidence in unfair labor practice charges against employers. The ultra-strict requirement which the decision establishes for proof of discriminatory intent coupled with the hypertechnical approach taken to the facts necessary to create a duty to bargain and to find a refusal to bargain, create precedents and guides which easily enable an anti-labor employer to destroy with impunity the protections which the Act establishes for his employees.

The 8(d) Questions.

2. The requirements of the Section 8(d) proviso depart from the general scheme of the Act that terms and conditions of employment should be settled by free collective bargaining. The section imposes certain special restrictions on the bargaining process where a contract is in existence, including severe restrictions upon employees in the use of their basic weapon of collective bargaining and self-

---

[5] Wirtz, *The New National Labor Relations Board; Herein of Employer Persuasion*, 49 Northwestern U. L. Rev. 594 (1954).

defense—the right to strike. Employees who strike in violation of its restrictions lose their status under the Act as employees of their employer.

Ascertainment of the meaning of the 8(d) proviso and the nature and extent of its restrictions is plainly of extreme importance to all employees and their employers. Their relationship is normally governed by contract and they must seek their adjustments of those relationships by adjustment of the contract without the risk of unfair labor practices and with knowledge of the results attached to such unfair labor practices, and must draft their contracts accordingly. This Court has already granted certiorari to review the similar question of whether or not an unfair labor practice of one party frees the opposing party to take economic action during the cooling off period. *Mastro Plastics* v. *NLRB*, October Term, 1955, No. 19, certiorari granted 348 U. S. 910. The Board itself has recognized that the restriction placed by 8(d) upon the right to strike are of "manifest importance in the scheme of the Act." (Petition for certiorari, *NLRB* v. *Lion Oil Co.*, No. ——, Oct. Term, 1955, p. 6.) The related question here presented, raising as it does the problems of when in the contract relationship and under what circumstances the proviso shall apply, is equally important.

Conflicts in the decisions of the Board itself and between the Board and Courts of Appeals as to the meaning and intention of the 8(d) proviso emphasize the importance of a resolution of the problems it raises. Of the nine Board members who have passed upon the proviso, four have held that the 8(d) proviso permitted a party to a contract to use economic action to secure modification of an agreement, at any time during a contract term, provided the required notices were given.[6] Two members have held that the proviso was intended to apply only to the period around

[6] Members Houston, Reynolds and Styles in *United Packinghouse Workers of America*, 89 NLRB 310, Member Peterson in *Lion Oil Co.*, 109 NLRB 680.

the termination of a contract and that the parties were not restricted in seeking modification of the agreement at any other time.[7] Three members have held that the proviso only permitted economic action either at the termination of a contract, or at a time when the contract itself envisaged modification.[8] Three members have held that economic action directed at unfair labor practices is not included within the scope of the proviso.[8a] Two members have held that the proviso does reach that action.[9]

The Court of Appeals for the Eighth Circuit has held that the proviso forbids all economic action absolutely during the life of an agreement.[10] Two judges of the Court of Appeals for the Second Circuit recognized a possible disagreement with the Eighth Circuit in holding that economic action to protect unfair labor practices is forbidden by the proviso.[11] A third Judge has adopted the rationale of Board Chairman Herzog and Board Member Murdock that 8(d) applies only during the period around the termination of an agreement, but permits of no exception when it does apply.[12]

The Court below has adopted a new position holding that the 8(d) proviso applies to all modifications of contract

---

[7] Chairman Herzog and Member Murdock in *United Packinghouse Workers of America, supra,* and *Mastro Plastics Corp.,* 103 NLRB 511, Member Murdock in *Lion Oil Co., supra.*

[8] Chairman Farmer, Members Rodgers and Beeson in *Lion Oil Co., supra.*

[8a] Members Houston, Stiles and Peterson in *Mastro Plastics Corp., supra.*

[9] Chairman Herzog and Member Murdock in *Mastro Plastics Corp., supra.*

[10] *Local No. 3 UPWA* v. *NLRB,* 210 F. 2d 325, cert. den. 348 U. S. 322; *Lion Oil Co.* v. *NLRB,* 221 F. 2d 231.

[11] Judges Chase and Frank in *NLRB* v. *Mastro Plastics Corp.,* 214 F. 2d 462.

[12] Judge Swan dissenting in *NLRB* v. *Mastro Plastics, supra.*

during the contract term. It holds even a request for modification by mutual agreement an unfair labor practice unless the notices required by the proviso be given and that under the circumstances herein employer might exert economic pressures upon his employees without regard to the limitations which 8(d) places upon the termination of an agreement, if only an employer might discover a prior violation of 8(d) by the union.

3. The Employer's termination of the contract here—standing alone—would violate plainly the requirements of 8(d). Section 8(d) was concerned with preserving industrial peace and mitigating industrial disputes during the times around the termination of an agreement by providing for a bargaining period when recourse to industrial warfare was forbidden both parties and when the help of the designated conciliation services should be available. The reported cases, including the 24 volumes of the Labor Arbitration Reports show that breaches of labor agreements by employers as well as unions is no more uncommon than other breaches of contract. An employer can no more avoid the requirements of Section 8(d) and provoke or prolong a period of industrial strife because the union's breach occasions its termination of contract, than a union may immediately rescind its contract and strike upon an employer's breach.

Moreover, the Employer's termination of the contract cannot be justified as an act of self-defense. The stoppage had been ended for five days when the contract was terminated. No urgency existed which could support the Employer's prolongation of the dispute in plain violation of the provisions of 8(d) for the mitigation of disputes.

4. Petitioner submits that the Court below erred in excising the case here from this general principle solely because the Union had sought modification of the contract in mid-term without giving the notices required at 8(d)(3). Both the language and history of the 8(d) proviso support

the position of Chairman Herzog and Board Member Murdock [13] that 8(d) was intended to have force only in the period around the termination of an agreement and hence did not apply to the proposal here to modify a contract by mutual agreement at mid-term. Reinforcement of this position may be found in the history of the legislation originally submitted to the Senate Committee [14] and the rejection by the Conference Committee of the proposal making violation of a contract during its term an unfair labor practice,[15] as well as the addition by the Conference Committee of a provision explicitly exempting parties from any duty to discuss modifications of an agreement except as provided by the agreement itself.[16]

Senator Taft specifically rejected the accusation that 8(d) would apply to foreclose the possibility of adaptation of a contract to changed conditions during its term.

> "Parties may meet and discuss the meaning of terms of their contract and may agree to modifications on change of circumstances but it is not mandatory that they do so." [17]

Even if the UE had committed an unfair labor practice by seeking incorporation of new contract provisions in mid-term without filing the notices required by Sec. 8(d)(3), and by a one-hour work stoppage, its violation would not support the drastic action of terminating the contract which

---

[13] *Lion Oil Co.*, 109 NLRB at p. 691; *United Packinghouse Workers of America*, 89 NLRB at p. 310.

[14] The proviso rejects the original proposal of S. 55, Sec. 3(2), (80th Cong. 1st Sess.) that a cooling off period should precede all economic action by either employers or employees and appears to adopt the scheme of S. 404, Sec. 3(a)(1) (80th Cong. 1st Sess.), applying restrictions only to changes in terms and conditions of employment to be incorporated in a "new" contract.

[15] House Conf. Rep. No. 510 on H.R. 3020, 80th Cong. 1st Sess. (1947), pp. 41-42, 1 Legislative History, LMRA, 545-546.

[16] House Conf. Rep. No. 510, p. 35, 1 Legislative History, 539.

[17] 93 Cong. Rec. 6860, 2 Legislative History, 1625.

the Court below upheld. Section 8(d) was intended to mitigate, not intensify labor disputes. A violation of its provisions does not grant an employer a hunting license for all time by which he may terminate a contract and refuse to negotiate in violation of the express provisions of 8(d) even though the union's unfair labor practice—if such there be—has ceased.

The decision below raises an important question for all parties to collective bargaining contracts. Changes in circumstances during a contract term are often sudden in their incidence and violent in their impact. If stabilization of collective bargaining relationships by written contracts is to be a feasible goal, then the parties to such contracts must know whether they may seek adjustments during the term of the contract without falling into unfair labor practices or must alter the duration and provisions of their contracts to forfend such a possibility.

The February 29th Discharge of the Non-Participants.

5. The decision below raises an equally important question by its departure from the previous general law governing the responsibility of individual union members for the acts of their union or of other union members. Previous decisions of this Court, grounded by fundamental constitutional considerations of due process (cf. *Schneiderman* v. *United States,* 320 U. S. 118), have established the principle that members of a union are not, by virtue of the sole fact of their union membership, liable for the acts of the union or other members unless their personal authorization, participation or ratification of those acts be proven. *United States* v. *White,* 332 U. S. 694, 702; *Lawlor* v. *Loewe,* 235 U. S. 522; *Eagle Glass & Mfg. Co.* v. *Rowe,* 245 U. S. 275; cf. *Coronado Coal* v. *U.M.W.A.,* 259 U. S. 344; *U.M.W.A.* v. *Coronado Coal Co.,* 268 U. S. 295. The decision below reverses this long established doctrine and treats membership in a Union as *prima facie* evidence of vicarious guilt.

The decision below and the Board's opinion treat the non-participants as an undifferentiated group. The decision, therefore, must rest upon the facts common to all of the non-participants. Those facts are:

1. All of the non-participants were union members.
2. None of them were shown to have dissented to the work stoppage prior to its occurrence.
3. All of them failed to identify themselves affirmatively as non-participants after the stoppage was over and after they had each been discharged by the Employer's statement of February 29th.

Resting on this evidence only, the decision below plainly reverses previous law as established by this Court. Individual authorization or participation is either not shown in the record or affirmatively disproved. Cf. *Lawlor* v. *Loewe*, 235 U. S. 522. Moreover, in this case, union membership need not even have been a voluntary act since it was compelled by contract. Nonetheless the decision holds that an employer may draw an inference of individual guilt for all acts of the Union from the mere fact of individual union membership, and may discharge an employee on the basis of this inference. An employee may only regain his employment by affirmative disproof of his participation, authorization and ratification. The Board and the Court below will, in their turn, accept the inference of guilt from Union membership and uphold the discharges made by reason of it. No longer must individual guilt be proven. It is assumed from the mere fact of Union membership and must be affirmatively disproved.[18]

In its reasoning, the decision below departs even further from the established rule and treats failure of an individual

---

[18] The scope of the Board's new departure from customary agency rules is emphasized by the Board's decision in *BVD Co.*, 110 NLRB #106, 35 LRRM 1246, holding union members responsible for the unauthorized acts of unknown persons not even shown to be union members.

Union member to offer disproof of guilt after his discharge as affirmative evidence of guilt in and of itself.

The departure of the Court below from established doctrine is emphasized by the tenuous nature of the circumstances which it treated as affirmative evidence of guilt. The Employer's statement of February 29th, treating all employees as participants, made no request that non-participants identify themselves or report for work, and gave no direction as to how to do so. When the non-participants reported for work on February 29th with the other workers, they found all plant gates locked. In such a situation a person of ordinary understanding might well conclude—as did the Trial Examiner who heard the witnesses (J.A. 152)—that the Employer was not interested in ascertaining the identity of the non-participants, but was determined to punish participants and non-participants alike, and that no further response was called for or necessary.

6. The decision below seriously modifies the meaning and significance of the "fundamental right" to join a union which Congress (in Section 7) has made the keystone of the structure of the Act. By sanctioning and adopting an inference of guilt from the mere fact of union membership, it restricts the sweeping grant of Section 7 and requires that an employee join a union at his peril, a peril resulting from the mere exercise of his protected right to associate with his fellows. It invites total destruction of this right by placing the livelihood of the individual union member at the mercy of employer agents provocateur bent on destroying the union [19] or of hotheads and troublemakers often owing allegiance to competing labor organizations.

The reasoning of the decision below reaches far beyond the scope of rights under the National Labor Relations Act. It affects the status, rights, duties and responsibilities of some 15,000,000 union members and their legal relationship

---

[19] Cf. *Remington-Rand, Inc.*, 2 NLRB 626; Sen. Rep. No. 6, Part 1, 76th Cong. 1st Sess. pp. 97-110, 136, 137.

vis a vis each other and their unions. It reaches all phases of the law where those relationships are legally significant, including injunction proceedings, criminal and civil contempt, damage claims in tort and contract, and rights to unemployment insurance. In addition it affects directly the great majority of collective bargaining contracts whose grievance and disciplinary clauses have been premised on the general rule as previously established and understood.

Moreover, the decision raises a grave constitutional question. The principle of personal guilt is "of the essence of the institutions of liberty."[20] The contrary principle of "guilt by association" created below by depriving the individual union members of the due process guaranteed them by the Fifth Amendment deprives them also of their freedom protected by the First and Fifth Amendments to associate in trade unions.

7. The decision below conflicts directly with decisions of other Courts of Appeals and of the highest court of Wisconsin where these events occurred. In *Marathon Electric Mfg. Corp.* v. *Industrial Commission and Leslie Dickinson,* 269 Wis. 394, 69 NW 2d 573, rehearing den. ___ Wis. ___, 70 NW 2d 576, upon the same facts presented here, the Wisconsin Court held that representative non-participants were not "guilty of any act of misconduct justifying their discharge." On petition for rehearing it pointed out, "We fail to see how conduct of an employee occurring after his discharge can constitute the basis for his discharge." ___ Wis. ___, 70 NW 2d at p. 576.

In *NLRB* v. *Marshall Car Wheel & Foundry Corp.* (CA 5), 218 F. 2d 409, the Court of Appeals rejected the employer's contention that it was justified in discharging all employees who had participated in a stoppage called by the union because certain of those employees had en-

---

[20] Memorial of the Special Committee appointed by the Association of the Bar of the City of New York, New York Legislative Documents, vol. 5, 143d Sess. (1920) No. 30, p. 4.

dangered employer property in leaving work. The Fifth Circuit—while not explicitly referring to the Board's *Marathon* ruling by name—plainly applied different standards of responsibility to individual union members for the acts of their union. The Court, in remanding the case to the Board, ruled that only those who had participated in or "aided or abetted" the unprotected activity had forfeited their right to reinstatement (218 F. 2d at p. 417, fn 12), citing *NLRB* v. *Ohio Calcium Co.* (CA 6), 133 F. 2d 721, 726. It reinforced this direction by a quotation from its opinion in *NLRB* v. *Braswell Freight Lines,* 209 F. 2d 622:

> "[W]e ought not summarily 'by our decree entered to protect the employees, too often the forgotten men in struggles of this kind, deprive *them* of the rights the Act confers *not on unions* as such but on *employees* as such.'" (Court's emphasis.)

The decision below, raising a presumption of guilt from the acts of other workers, is in conflict, at least in principle, with *Stewart Die Casting Corp.* v. *NLRB* (CA 7), 114 F. 2d 849, cert. den. 312 U. S. 680. There the Employer contended that it need not reinstate a group of employees, some of whom were shown to have participated in a sit-down strike. The Seventh Circuit rejected the employer's attempt to place the burden of proving their innocence upon the employees, saying in part:

> "It would seem that petitioner's right in this respect, if any, would constitute matters of defense to the Board's charge and the burden was upon petitioner to offer proof in support thereof. Certainly, all of the employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights" (114 F. 2d at p. 856).

Settlement of the conflicts in principle between the decision below and the general law as reflected in prior opinions of this Court, as well as the more direct conflicts with the decisions of other Courts of Appeals and the Supreme Court of Wisconsin is plainly in the public inter-

est. Neither industrial workers nor local union officials are sophisticated in the law, and the law which guides them in this vital phase of the employer-employee relationship should be clearly established.

Resolution of these conflicts is important, too, so that the parties to collective bargaining agreements may be guided in their conduct under these agreements and the drafting of new agreements. If Federal law is to differ from state law in the union-member-employer relationship (which is governed either singly or jointly in its various aspects by either or both), that fact should be known so that all concerned may guide their conduct accordingly.

8. The Employer's flat refusal in its letter of February 29th to bargain with the union leadership representatives chosen by workers constituted a plain violation of Sections 8(a)(1) and 8(a)(5) of the Act.[21] The decision below is therefore contrary to the opinion of other Courts of Appeals holding that an employer may not force its employees to choose between applying for work under illegal conditions of employment and the loss of their livelihood. *Stewart Die Casting Corp.* v. *NLRB* (CA 7), 114 F. 2d 849, 855, cert. den. 312 U. S. 680; *NLRB* v. *Mastro Plastics Corp.* (CA 2), 218 F. 2d 462, cert. granted 348 U. S. 910; *NLRB* v. *E. A. Laboratories, Inc.* (CA 2), 188 F. 2d 885, cert. den. 342 U. S. 671; *NLRB* v. *Kobritz* (CA 1), 193 F. 2d 8; *Berkshire Knitting Mills* v. *NLRB* (CA 3), 139 F. 2d 134, cert. den. 322 U. S. 747; *NLRB* v. *Stilley Plywood, Inc.*, 199 F. 2d 319, cert. den. 344 U. S. 933; *NLRB* v. *Brown & Root, Inc.* (CA 8), 203 F. 2d 139; *NLRB* v. *West Coast Casket Co., Inc.* (CA 9), 205 F. 2d 902. Resolution of this conflict, raising as it does the whole question of the rights and remedies available to employees whose employers commit unfair labor practices, is plainly important in the administration of the Act.

---

[21] Cf. *Marathon Electric Mfg. Corp.*, 106 NLRB, at p. 1175 (J.A. 190-191).

The Employer Refusals to Bargain.

9. The ruling below, upholding the Board's forfeiture of employee's bargaining rights during a breach of contract by their union, transforms the Act from a remedial one servicing the interest of industrial peace to a punitive instrument of the jungle law of industrial warfare. The fact is that if industrial disputes are to be ended as rapidly as possible (the purpose of the Act), a channel of communication between an employer and the union must remain open, if only for the purpose of receiving an offer of unconditional surrender. Closing of this channel can only defeat the primary aim of the Act by intensifying and prolonging labor disputes. When the Employer here refused to meet with the Union to discuss the locking of the gates it prolonged the already terminated stoppage by what was at best a childlike display of spite, and at the worst, part of a scheme to destroy the Union. In either case the Employer's refusal to meet was contrary to the purpose of the Act.

Not in issue here are questions of the various rights of the parties—once the collective bargaining process has begun—during a breach of contract and the remedial action appropriate to the varied situations which may arise, e.g., whether an employer or a union confronted with a breach of contract must bargain upon the substantive merits of the dispute giving rise to the breach.[22] Nor is the right of a party to a contract to hold the other party to the terms of the contract raised here.[23] Those questions assume that collective bargaining is continuing and merely involve the regulation of its conduct. The decision below raises a question more fundamental to the scheme of the Act—whether there is to be collective bargaining at all, whether the obli-

[22] Cf. *Timken Roller Bearing Co.* v. *NLRB* (CA 6), 161 F. 2d 949.

[23] Cf. *NLRB* v. *Dorsey Trailers, Inc.* (CA 5), 179 F. 2d 589.

gation to bargain collectively is to be administered as a part of a system of rewards and punishments or is to be treated as a part of remedial statute for the purpose of avoiding industrial strife and unrest.

The Court below confuses here, as elsewhere, the "employees" to whom the Act grants rights with the unions which represent them. The question is not, as the Court below held it to be, whether the Union breached its contract. The question is whether employees, as long as they remain employees, shall have the right "to bargain collectively through representatives of their own choosing." The nature of this right and the employer's correlative duty must vary with the specific situation. Nothing in the Act authorizes its destruction as a punitive measure.

The importance of this question is emphasized by the fact that the present Board is continuing to treat the rights granted "employees" by the Act as rights subject to forfeit as a punishment. In a recent case, *Valley City Furniture Co.*, 110 NLRB No. 216, 35 LRRM 1265, it ruled that an employee who had engaged in a partial strike might—as a "legitimate disciplinary action"—be compelled to bargain individually with an employer even on a personal grievance without the presence of his bargaining representative.

The decision below enhances the vice of the Board's punitive deprivation of rights guaranteed to employees by the Act, by applying this punishment indiscriminately. Not only were the employees who participated in the strike deprived of their rights under Section 7. The innocent employees, including those on layoff status, were punished as well. The UE was their collective bargaining agent. They had committed no wrong. Yet, through no fault of theirs, they were deprived of their right to bargain through their representative and to secure a reopening of the gates so that they might return to work.

10. The decision below is the first conflict in principle on the Court of Appeals level with the decision in *NLRB*

v. *Highland Shoe, Inc.* (CA 1), 119 F. 2d 218.[24] That case differed slightly from the case here in that it involved a refusal to bargain after notice of the termination of a strike in breach of contract, but the decision did not rest upon that difference. The First Circuit found that the employer had violated the Act, holding (at p. 222):

> "Furthermore, unless the statutory duty to bargain collectively is held to remain in force even after a labor contract previously made has been broken, the purpose of the Act, to promote industrial peace through collective bargaining will be obtained only in small measure."

Plainly, in the light of the Board's continuing expansion of its doctrine of "forfeiture" of bargaining rights, resolution of the conflict here is of importance in the administration of the Act and the conduct of the employers and employees governed by it.

11. On the morning of February 29th, when the employees reported for work at the plant gates, the Employer was emphatically put on notice of the termination of the stoppage. No discharges having occurred the UE was plainly the representative of a substantial and representative complement of the employees and the Employer was obliged to bargain with it in response to the UE's request for bargaining made in the late afternoon of the previous day. The decision below does not so hold, adopting the contention by the Board that no violation of the Act occurred since the Union had not on the morning of February 29th renewed its request for a meeting to discuss the lockout which it had made only fifteen hours before.

---

[24] *NLRB* v. *Dorsey Trailers, Inc.* (CA 5), 179 F. 2d 589, and *Timken Roller Bearing Co.* (CA 6), 161 F. 2d 949, deal not with the existence or forfeiture of the duty to bargain, but its content in various situations. In *Timken*, the Court explicitly did not decide the question of whether "by a breach of a no-strike agreement the Union surrendered bargaining rights preserved for it by the Act" (161 F. 2d at p. 954).

This position is in square conflict with other Courts of Appeals. In *NLRB* v. *Burton-Dixie Corp.* (CA 10), 210 F. 2d 199, the Court held that a request for bargaining which was ineffective at the time made for lack of majority support among the employees retained its vitality for twenty-three hours. A renewal of that request was unnecessary when a majority was obtained in the intervening period and the prerequisites for collective bargaining satisfied. In *NLRB* v. *M. H. Ritzwoller Co.* (CA 7), 114 F. 2d 436, the Court held (at p. 436) "it is not incumbent upon the employees continually to renew the proposal" and that a union request for bargaining retained its vitality for eight days.

The technical steps necessary to give rise to the duty to bargain on the part of an employer or union are clearly important in the scheme of the Act. Cf. *NLRB* v. *Columbian Enamelling and Stamping Co.*, 306 U. S. 292, 297. To the degree that they are encumbered by the requirement of mandarin niceties of etiquette the obligation to bargain is vitiated. The decision below, adopting the hypertechnical approach by the "new Board" ignores the realities of collective bargaining which is usually conducted on an informal basis by men untutored in the law. Certainly, the conflict in the circuits based upon opposing approaches to collective bargaining should be resolved so that all concerned may attempt to guide themselves accordingly.

12. In point of fact the Employer knew of the termination of the stoppage on February 28th and February 29th and breached its obligation to bargain on both days. The Trial Examiner after hearing the witnesses accepted the following as a correct version of the telephone conversation between the UE and the Employer's Plant Manager on February 28th.

> "[We] told him that we had a membership meeting that afternoon and the company had locked the workers out. We told him that we wanted him to understand

that the members of the bargaining committee knew that he was not responsible for the Company's actions, and he assured us that he was very much concerned over the company's actions, that he had a lot of respect for the union, for the bargaining committee, for the manner in which he handled our dealings and negotiations with him, and that he was very much concerned over the locking of the gates, and he would contact Mr. Wall and see if he couldn't do something to get us together in negotiations again. We thanked him for his concern and told him that we could be reached at any reasonable hour at the union office by phone" (R. 16).

The Board was plainly incorrect in its description of this conversation as merely requesting "a conference to settle the strike issues" (J.A. 198). The credited testimony gives not one scintilla of support to this finding, upheld below. It completely supports the findings of the Trial Examiner (buttressed with all the authority which *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, gives it) that—the stoppage having ended—the Union sought to confer "concerning the termination of the strike and the return of the employees" (J.A. 150-151, 154; cf. J.A. 158).

The Union in its call to the Employer made no demand whatsoever for negotiation of the issues giving rise to the strike, either as a preliminary to the return to work or otherwise. The only issue it raised was the gates being locked, the traditional sign of no work. Since the gates were already locked, the Union could only have raised this question because it wished them open, i.e., because the stoppage was over. The whole tenor of the Plant Manager's response ("He was very much concerned over the Company's actions. He was very much concerned over the locking of the gates") shows that this also was his understanding of the Union's position. The Employer was unmistakably put on notice on February 28th of the termination of the stoppage. By refusing to return the Union's telephone call and to agree to a meeting, it violated the Act.

The Discriminatory Nature of the Discharges of the Participants in the Stoppage and the Failure to Recall the Laid-off Workers.

13. The issues discussed above are part of a whole and connected one to another by the common link of the Employer's basic motivation for all its actions herein—the total destruction of the Union. It was this motivation which the record shows underlay the discharge of all workers, including the participants in the stoppage and the refusal to recall the laid off workers by their seniority under the contract. The discharges of the participants and the failure to recall the laid off workers, "based upon the exercise of legal rights which the statute was designed to conserve" were discriminatory and violated the Act.[25]

The evidence in the record with regard to the Employer's discriminatory intent stands as follows:

a. The Employer admits that on February 28th it resolved absolutely and without condition "never to deal or bargain with the union again" (J.A. 108).

b. It discharged all employees on the active roll of February 29th making no distinction between them, although its own records showed it that many of these employees did not and could not have participated in the stoppage.

c. It explicitly tied these discharges to union membership by basing them upon the "action taken by the Union and its members" and refused to deal with "the present union leadership" (J.A. 167-168).

d. It refused to meet with the Union on February 28th or 29th even though it knew of the termination of the stoppage and even though it knew that the union represented a substantial number of employees who had not participated in the stoppage.

---

[25] *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 256-257. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45.

e. Rather than recalling the laid off employees experienced in its operations, it advertised on March 3rd for new employees, although experienced hands are plainly more efficient than new workers. Moreover, the Employer made it clear that response to its advertisement would mean abandonment of the Union by stating "There is a strike in progress," a statement it knew to be untrue (J.A. 168).

f. In terminating the contract on March 5th it again advised the employees in asking them to apply for work that a restoration of their seniority depended, if they did apply, on their adherence to and selection of "a union which will act in a responsible way" (clearly not the UE to the Employer's mind) (J.A. 169).

g. On March 18th it discharged four watchmen in violation of the Act by conditioning their employment upon resignation from UE (J.A. 190).

h. On March 22nd it stated that it would only deal with a union which has "an established reputation of living up to their agreements" (in this context a clear exclusion of UE) (J.A. 172).

i. It assisted, sponsored, contributed support to and interfered with the formation of a rival union in violation of section 8(a)(2) of the Act shortly after the plant was reopened (J.A. 190).

j. Representatives of the Employer repeatedly stated they would never deal with UE again (J.A. 190-191).

This catalogue at the least presents a *prima facie* case which required the Employer "to distintangle the consequences with which it is chargeable from those from which it is immune."[26] Yet the Employer did not even attempt

---

[26] L. Hand, J., *NLRB* v. *Remington Rand* (CA 2), 94 F. 2d 862, 872.

to meet this burden. None of its witnesses even bothered to deny its discriminatory intent and its President boldly affirmed his anti-union motivation (J.A. 108). In short, the General Counsel's *prima facie* case of violation of Section 8(a)(3) stands unrebutted. All the evidence supports the General Counsel's position that the discharges of the participants in the stoppage and the refusal to recall the laid off workers was discriminatory and violated the Act.

14. The question of whether or not the actions of the participants in the stoppage violated the requirements of 8(d) has been discussed in paragraphs 2 to 4 above. Assuming arguendo that such violation existed an important question is raised by the decision below that the Employer was privileged thereby to discharge the participants in the stoppage—not because of their participation in the stoppage but solely because of their membership in the Union.

A strike in violation of 8(d) deprives participants of their status to employees of the employer engaged in the particular labor dispute "for the purposes of sections 8, 9 and 10" of the Act. A reading of the Act compels the conclusion that this provision is not meant to and does not permit an employer to discriminate against an employee because of his union membership. The limitations of 8(a)(3) do not depend upon the possession of "employee status." Discrimination of all kinds is prohibited. *Phelps Dodge Corporation* v. *NLRB*, 313 U. S. 177.

This limitation is in accord with the scheme of the Act from its inception. An employer has at all times had the right to discharge an employee for cause, including the employee's breach of contract. Cf. *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332. At no time might an employer use this right "to discourage membership in any labor organization" (Sec. 8(a)(3)). The 8(d) proviso leaves this scheme of the original Act unchanged. The decision below reversing this scheme and licensing discriminatory action by an employer will serve as precedent for other employers

to seek for and find technical violations of Section 8(d) and, by forcing a strike, issue to themselves a similar license to discriminate in violation of the Act. It raises, therefore, a serious and important question which this Court should decide.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID SCRIBNER,
BASIL R. POLLITT,
11 East 51st Street,
New York 22, New York,

ARTHUR KINOY,
342 Madison Avenue,
New York, New York,
Counsel for Petitioner.